IN THE

Supreme Court

OF THE

United States

John D. Hooker,
Plaintiff in Error,

vs.

John Burr, A. W. Rhodes, and W. A. Hammel,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

Statement of Facts.

The Spencers made a note and mortgage to Swigart, in 1893; Swigart assigned the note and mortgage to Bishop; Bishop foreclosed the mortgage, under which the property was sold on 13th June, 1898, and bought in by Hooker for $9500.00.

The title to the property in dispute and described in the mortgage was vested in Anna P. Spencer. Nichols held a note against her, dated

January 19th, 1897, the consideration of which was a debt for $875.00 created in 1896, on which suit was commenced by Nichols against Mrs. Spencer the ———— day of August, 1897, and obtained a judgment for $1015.35, which was docketed Oct. 1st, 1897.

In 1897, and before June 10th of that year, Mrs. Spencer was involved in debt and litigation. Besides the Nichols note she owed various other people, some of whom were secured by mortgages on her property to the amount of about $30,000.00 (including the Swigart mortgage).

And foreclosures were being threatened on these mortgages. She was also involved in litigation with Isabel Spencer, who was suing to recover the property from her. Also one Mulligan filed a suit against her in April, 1897, in which summons was served on her on 23rd April, 1897, for the sum of $43,600.00 [Tr. p. 65—Original Page 117, and Tr. 68—O. P. 122], and which suit was on the 10th day of June, 1897, pending in the Superior Court of Los Angeles county, California. While she was thus involved, she owned property valued at about $140,000.00, on which were the mortgages above referred to, amounting to about $30,000.00—though some of the property, to-wit, a ranch worth $2500.00 and other small properties worth $2000.00, were clear of incumbrances.

She had lost the suit in the Isabel Spencer case and was seeking to appeal to the Supreme Court and needed $1500.00 for immediate purposes in conducting the appeal [Tr. p. 57—O. P. 103 and Tr. p. 58—O. P. 105]. On June 10th, 1897, and for a long time prior thereto, she was indebted to Charles J. Shepherd in the sum of about $3000.00 [Tr. p. 98—O. P. 177 and Tr. 58—O. P. 105].

Her attorney, Judge Lamme, had vainly made repeated efforts to raise the money for necessities, to quiet creditors and carry on the appeal [Tr. p. 57—O. P. 103]. His efforts had proven futile, until he found Shepherd. Judge Lamme had been met on every hand with objections by money lenders that they would not loan money on the property on account of Mrs. Spencer being connected with it [Tr. p. 57—O. P. 103]. Judge Lamme then "concocted the scheme" of placing the property in Shepherd's hands [Tr. p. 57—O. P. 103] to raise the money, who was to undertake the matter of raising the money if the deed was made to him as security for his debt from Mrs. Spencer and the property turned over to him without "strings on it," so he could handle it. The purpose of making the deed was to place it in the hands of Shepherd as security [Tr. p. 58—O. P. 105].

So, under these conditions and circumstances,

by advice of her attorney, Judge Lamme, she executed the deed to Dickey, conveying to him without any consideration property worth $140,000.00 [Tr. pp. 51, 52, 53]. Dickey knew nothing of the deed [Tr. pp. 55 and 56—O. P. 100, 101], had paid nothing [Tr. p. 55—O. P. 100], and Shepherd paid nothing [Tr. p. 55—O. P. 100]. This deed was immediately put on record, and Dickey then, by dictation of Shepherd, who acted for Mrs. Spencer by advice of Judge Lamme, her attorney, and without any knowledge of the facts, executed a deed conveying all the property to Shepherd [Tr. p. 55—O. P. 100] the same day, which latter deed was not placed on record until December, 1898 [Tr. p. 39—O. P. 69].

After Dickey had conveyed all the property to Shepherd, he again, at the direction of Shepherd, on advice of Judge Lamme, and without any knowledge of the facts, executed a deed to Stiles, conveying 1-3 interest in the property [Tr. p. 55—O. P. 100].

Judge Lamme testified that he advised it, for the purpose of gaining time on the mortgage foreclosures [Tr. p. 60—O. P. 109].

Shepherd never claimed to own the property, and in all negotiations for the property, Shepherd did not pretend to claim it, but admitted that it belonged to Mrs. Spencer, and all the ne-

gotiations were carried on in the interest of Mrs. Spencer and through Judge Lamme, her attorney, Shepherd even referring the parties to Lamme and entering into the negotiations with them on behalf of Mrs. Spencer.

Shepherd did not treat the property as his own in other ways than that mentioned. He did not take possession of it nor collect rents from it—some of the property being rented, and Mrs. Spencer continuing to collect the rents [Tr. pp. 49, 50—O. P. 88, 89, 90, and Tr. p. 101—O. P. 182]. And Mrs. Spencer remained in actual possession in her own right of the property in dispute from a long time prior to June 10th, 1897, up to the time that the possession was delivered to Rhodes, in February, 1899 [Tr. p. 101—O. P. 182, and Tr. p. 75—O. P. 134]. Shepherd did not pay the taxes on the property for 1897; nor did he give it in for taxes in 1898, nor pay taxes on it for 1898, though he did pay taxes on his own property in 1897 and rendered a sworn statement to the tax receiver for 1898 of his own property, which did not include any of the property described in the Dickey deed [Tr. p. 100—O. P. 180, 181]. Also, at a further settlement between Mrs. Spencer and Shepherd, Shepherd took from Mrs. Spencer a second deed to the property, except that in controversy and the El Monte Rancho.

Nichols duly assigned his judgment vs. Mrs. Spencer to Rhodes in 1898, a long time before the redemption. About 12th day of December, 1898, Rhodes called Hooker up over telephone and told him he was redeeming the Spencer property, and that he intended to redeem the Broadway property bought by him, and made an engagement to meet Hooker at his place of business that day at 2 p. m. [Tr. p. 75—O. P. 134, 135]. At 2 p. m. Rhodes went to Hooker's place, prepared to make the redemption, and Hooker failed to meet his engagement. [Tr. p. 75—O. P. 134, 135.] That evening, about 6 o'clock, Rhodes, accompanied by Mr. Anderson, drove out to Hooker's residence, on Adams street, and carried with them the notices required by law to make the redemption; also carried $10,500.00 in gold coin to pay Hooker the necessary amount to effect the redemption. [Tr. p. 75—O. P. 134, 135.] When they rang the door bell, the servant came to the door, and, on inquiry, she stated that Mr. Hooker was in. Mr. Anderson requested her to tell Mr. Hooker that Mr. Rhodes and Mr. Anderson desired to see him, and soon she returned and stated that Mr. Hooker was not in. Rhodes and Anderson returned to the office of Clark & Bryan on Third street. Mr. Clark took the $10,500.00 gold coin and placed it in the First National Bank that

night for safekeeping by putting it in a drawer in the bank building, but did not make a *deposit* of it in the bank. The next morning Clark and Rhodes went to the sheriff's office and saw the sheriff and told him that Rhodes was going to make the redemption, and stated to him that Rhodes had the gold coin on hand with which to make the payment, and that he would bring up the gold coin from the bank to make the payment. The sheriff told them that he wanted a certified check and not the gold coin. [Tr. pp. 102, 103—Original Pages 185, 186.] Mr. Clark then went at once to the bank, *deposited* the $10,500.00 gold coin, and had a check for $10,070.00 certified by the bank and took it to the sheriff for Rhodes, and delivered it to the sheriff for Rhodes in payment of the redemption. [Tr. p. 103—O. P. 186.] When the payment was made and the redemption perfected—the same day, December 13th, 1898—the sheriff notified Mr. Hooker that he had his money on the redemption of the property. [Tr. p. 32—O. P. 55, Tr. p. 34—O. P. 59, Tr. pp. 36, 37—O. P. 64, Tr. p. 38—O. P. 67, Tr. p. 77—O. P. 137.] Hooker declined to accept the money from the sheriff. After Hooker declined to accept the money, the sheriff retained the certified check, and it was cashed in November, 1899. It could have been cashed at any time after it was delivered to the sheriff, and

was only kept by the sheriff as a matter of convenience, after Hooker had declined to accept the money.

A further statement of the facts is found in the opinion of the Supreme Court of California commencing at page 114 of Transcript. See particularly page 115 [Original Page 208].

The question now before this court is: Whether Rhodes, in making the redemption should have paid 2 per cent. on the purchase price as required by Sec. 702, Code of Civil Procedure of California, as the law stood in 1893, the date of the mortgage; or whether he should have paid only one per cent. as required by the law as it stood in 1898, the date of the sale.

The note and mortgage under which the sale was made was executed in 1893. Sec. 702, Code of Civil Procedure of California was then as follows:

"The judgment debtor or redemptioner may redeem the property from the purchaser at any time within six months after the sale, on paying the purchaser the amount of his purchase, with two per cent. per month thereon in addition, up to the time of redemption." * * *

In 1895 said section was amended by reducing the per cent to be paid on redemption from 2 to 1 per cent.

In 1897 the same section was again amended by changing the time of redemption from 6

months to 12 months, leaving the per cent. to be paid one per cent.

The sale was made in 1898—and the redemption was made within 6 months after sale, the redemptioner paying 1 per cent.

And plaintiff in error claims that 2 per cent. should have been paid on redemption as required by the law at the date of the mortgage contract; and that the amendment of the statute reducing the per cent. from two to one per cent. after the date of the mortgage contract was inapplicable, as being violative of the provisions of the constitution of the United States, because it impaired the obligations of the contract.

POINTS.

(Briefly stated.)

I.

That there is no question of a federal nature in the case which draws in question the construction of the Federal Constitution, or which would authorize the writ of error.

1. Where the same judgment could have been made without regard to a federal question a federal question is not raised. This judgment could have been made against the plaintiff in error without reference to the construction of the federal constitution:

(a) The plaintiff did not allege or prove the judgment under which he claimed to have purchased.

(b) The specifications of the plaintiff in error in his statement on motion for a new trial were not sufficient in form and substance to attack the findings of the court.

(c) The sheriff was agent of the purchaser for the purpose of receiving payment and the purchaser is bound by the act of the sheriff.

2. That the exact question as to the per cent to be paid has been adjudicated by a decision of the Supreme Court of the United States, which decision has never been overruled, and it is not now an open question, nor is it a *federal question* or a *question* at all, and does not draw in question the construction of the constitution of the United States.

II.

If there should be a federal question raised, or if there is drawn in question the construction of the Constitution of the United States, the plaintiff in error is not entitled to any relief.

1. It does not appear that the judgment obtained by Bishop, under which the sale was made, was made payable in gold coin of the United States.

2. The question as to whether the check was a payment, whether the check was cashed at once or after the time of redemption was out, or whether the check of Clark & Bryan was as effective as would have been the check of Rhodes, are not in any sense *federal* questions, and having been decided by the Supreme Court of California are conclusive and are not reviewable under the writ of error. This leaves the sole question to be reviewed to be as follows: Was the amount of per cent paid on redemption sufficient?

3. The amount paid was sufficient and was all the law required. That the law in force at the time of the sale governs the redemption.

The contract of the purchaser commences with his purchase.

The laws which entered into the contract are those which in their direct and legal operations controlled or effected the obligations of the contract.

The person who is not a *party* to the contract cannot complain that a law impairs its obligations.

The *party* to the contract cannot complain unless he is injured by the law of which he complains.

Every case depends upon its particular facts as to whether the law is applicable and constitutional or whether it is inapplicable and unconstitutional.

The identical question having been settled by the Supreme Court of the United States in Con. M. L. I. Company v. Cushman (108 U. S., p. 50), and reaffirmed in Barnitz v. Beverly (163 U. S., p. 118), is not now an open question.

4. If it should now be held that the laws at the date of the mortgage controlled as to the per cent. to be paid on redemption, and not the law at the date of the sale, we say that the law having been settled by the Supreme Court of the United States and by the decisions of the Supreme Court of California, for a long number of years, to the effect that the law at the date of the sale is the law which controls in making the redemption, that the redemptioner in this case had the right to assume that such was the law, and where the redemption was attempted in good faith he should now be allowed to perfect his redemption by paying the deficiency.

The foregoing points will be elaborated in the argument following, and authorities there cited to support them.

ARGUMENT AND AUTHORITIES ON THE POINTS ABOVE STATED.

I.

There is no federal question raised which would authorize the writ of error or authorize a review of the judgment of the Supreme Court of California on writ of error.

1. To entitle the plaintiff in error to review by writ of error, there must be "drawn in question the validity of a statute of or any authority exercised under, any state, on the ground of their being repugnant to the constitution * * * of the United States, and the decision is in favor of their validity."

That is, where the judgment to be reviewed cannot be made or upheld without drawing in question the validity of such statute and upholding its validity.

Even though such question is made in the pleadings and presented in the facts, yet if the judgment is such that it could be made or upheld on any other ground, to the exclusion of the federal question, then the judgment will be upheld on such ground and no such question is involved.

In other words, the federal question must be essential to the judgment, otherwise it is not involved.

Foster's Fed. P., p. 1188.

The fact that the federal question is discussed in the opinion of the court rendering the judgment, and the discussion of other grounds upon which the judgment might have been made are omitted, would not change or affect the rule, if such distinct grounds for the judgment exist. The opinion is not the judgment—it simply gives reasons for it—though it may omit many good reasons. Now can this judgment, from which the writ of error is issued, be upheld on any ground without involving the question of the per cent. to be paid on redemption?

We contend that there are grounds upon which the Supreme Court of California could have made the judgment without considering the question of the per cent. paid upon the redemption.

(a) Before plaintiff could recover in this case he must show a valid judgment under which he purchased. Where he seeks to set aside a deed made on redemption from a sale to him, one essential element of a valid purchase would be a valid judgment. Section 456 of the Code of Civil Procedure of California is as follows:

> Section 456. In pleading a judgment or other determination of the court officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly *given* or *made*.

Plaintiff only alleged in his complaint that a judgment was duly *rendered*. He did not allege

that it was *given* or *made*. Neither did he allege the steps which led up to the judgment. The allegation that a judgment was *rendered* is not an allegation that a judgment was *given* or *made*. The *rendition* of a judgment is held by the Supreme Court of California to be a signing and filing of the findings. The *rendition* of judgment does not constitute the judgment.

Crim v. Kessing, 89 Cal. 479;
Painter v. Painter, 113 Cal., p. 375;
Wood v. Etawanda Water Co., 122 Cal. 152.

And there was no evidence before the court proving the judgment.

(b) The specifications of error in the statement of the plaintiff on motion for a new trial in said action, did not specify the *particulars* wherein the evidence was insufficient to justify the decision. Section 659 of the Code of Civil Procedure in California, Subdivision 3, in part reads as follows:

"When the notice of motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement should specify the particulars in which such evidence is alleged to be insufficient." * * * "If no such specifications be made the statement shall be disregarded on the hearing of the motion."

The first nine specifications under this head do not specify any of the *particulars* in which the evi-

dence was insufficient to justify the decision, and consequently under the repeated rulings of the Supreme Court of California they cannot be considered in attacking the findings pointed out. 90 Cal. 323; 57 Cal. 617; 92 Cal. 617; 66 Cal. 552; 68 Cal. 528; 70 Cal. 136; 65 Cal. 402; 68 Cal. 528; 106 Cal. 652; 107 Cal. 703; 108 Cal. 365; 114 Cal. 346; 86 Cal. 128; 116 Cal. 416; 79 Cal. 449; 119 Cal. 5.

If there are sufficient findings to support the judgment besides those attacked, the judgment will not be reversed. Eliminating all the findings which were attacked by proper specifications, there still remained findings sufficient to support the judgment.

Kellerman v. Maier, 116 Cal. 417;
Spaulding v. Bradley, 79 Cal. 449.

The specification should be definite in pointing out the fact at which it is aimed, and specifications which are general in their scope, without pointing out any particular fact, will not be considered.

The specification which attacks a general proposition stated in one finding, cannot affect the specific facts found in other findings which taken together would make up the general proposition.

McCormick v. Natl. Surety Co., 134 Cal. 510.

(c) That the sheriff is agent of the purchaser for the purpose of *receiving* payment.

Sec. 704, Code Civil Procedure, California, provides: "The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him to the officer who made the sale."

The *payment* may be made to the officer who made the sale. He is the agent of the purchase for the purpose of *receiving payment*. He is not such agent to the extent of deciding *who* may make such payment. For that, he looks only to the proofs made by the redemption for his authority to redeem. And if the sheriff should *receive payment* from one who is not an authorized redemptioner, his act would not bind the purchaser and there would be no redemption. This is the extent to which the case of Bennett v. Wilson, 122 Cal. 516, goes. The law does not make him the agent to determine who may redeem. That is regulated by the proofs made under the statute. But the law does make him the agent to *receive payment*. Now when the redemptioner goes to the legally authorized agent of the purchaser to make his redemption, and this agent says only so much is necessary to effect redemption, and the redemptioner pays it in good faith, believing it to be correct, and the agent believed it to be correct, but the agent made a mistake of a few dollars, and the time for the re-

demption runs out,—who should suffer for the agent's mistake? Should the redemptioner lose his right to redeem on that account, or should the purchase have recourse upon his agent for his mistake? We say, therefore, that the act of the agent, in receiving payment, as between the redemptioner and purchaser, binds the purchaser, so far as the *payment* is concerned, where it is all done in good faith and there is no fraud.

The citation from Freeman on Executions (3d Ed., Sec. 320), quoted by counsel for plaintiff in error, contains this statement: "Such officer is deemed to be so far the agent of the person from whom the redemption is sought to be made, that he may waive the latter's right to object to a tender or payment by the redemptioner, part of which is national bank notes or paper currency."

In People v. Mayhew, 26 Cal. 656, it was held that the sheriff was special agent of the purchaser to receive payment, and might receive current money which was not legal tender, though objected to by the purchaser,—that his discretion is like that on receiving payment on sale under execution.

The scope of the agent's authority is in *receiving the payment.* In this it is not limited—though the *amount* is fixed by statute. And when he acts within his authority, an innocent mistake on the part of the agent could not, either

in morals or law, jeopardize the rights of the redemptioner.

So, if this be the law, then the judgment may be upheld without regard to any federal question in the case.

(d) Where the question has been decided by the Supreme Court of the United States, which decision has never been overruled but has been approved in a later case by the same tribunal, there is no federal question involved; in fact, no *question* at all.

In the case of Con. M. L. I. Company v. Cushman, 108 U. S. 50, this court decided the identical question presented here.

That was a case where Cushman executed to Con. M. L. I. Company a mortgage and at the date of the mortgage the redemption laws of Illinois required the payment of 10 per cent. on redemption. After the execution of the mortgage, the redemption laws were amended, reducing the per cent. to be paid on redemption from 10 per cent. to 8 per cent. The Con. M. L. I. Company foreclosed the mortgage and the property was sold after the change in the law reducing the per cent. The mortgagee was the purchaser at the sale. The mortgagor redeemed the property and paid the 8 per cent. as required by the law at the date of the sale; and thus arose the question which is exactly in point with the case before the court.

Quoting from Con. M. L. I. Company v. Cushman, the court say:

"The statute in force when the mortgage was executed prescribing the rate of interest which the amount paid or bid by the purchaser should bear as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. * * * The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when * * * the sale occurred. Thenceforward its interest in its property was as purchaser, not as mortgagee; and to require it as purchaser to conform to the terms for the redemption of the property as prescribed by statute at the time of the purchase, does not in any legal sense impair the obligations of its contract as mortgagee." * * *

This decision was made in the year 1883 and such has been the law ever since. It has never been doubted in any subsequent decision by this court, but was referred to and approved in Barnitz v. Beverly (*supra*) and was therein distinguished from that case.

The case of Barnitz v. Beverly, in which the Con. M. L. I. Company was approved, is the authority relied on by plaintiff in error for raising the question in this case. We submit that where this court has decided the question and such decision has remained the law and the rule of property for 21 years that it is not now a *question* and

the Federal constitution having been construed the question could be raised again. It is the fixed and settled law of the land and not a *question.*

In Kansas v. Bradley, 26 Fed. R. 289-290, this court said: "When a proposition has once been decided by the Supreme Court of the United States, it can on longer be said that there still remains a Federal question. More correctly it is said that there is no question, state or federal."

And the same in Bluebird Mining Co. v. Largey, 49 Fed. R. 289-291.

While these decisions were upon the question as to the jurisdiction of the Circuit Court, we see no reason, on principal, why they would not equally apply to the proposition here presented.

For these reasons there is not drawn in question the construction of a clause of the constitution of the United States, wherein the decision is against the right claimed; which is necessary to authorize the writ of error; and the judgment of the Supreme Court of California should be affirmed.

II.

If there is such question raised as would authorize the writ of error, the plaintiff in error is not entitled to any relief.

1. Plaintiff in error claims payment should have been made in gold coin.

(a) We contend that it nowhere appears either in the pleadings or the evidence that the Bishop's judgment under which the sale was made was "made payable in gold coin", or any specific kind of money. To obtain a judgment payable in a specific kind of money, the statutes of California [Section 667, Code of Civil Procedure] requires: "In all actions for the recovery of money, if the plaintiff alleges in his complaint that the same was understood and agreed by the respective parties to be payable in a specific kind of money or currency and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint."

The allegation in the complaint in the case at bar in reference to the specific kind of money is that in the suit of Bishop v. Spencer "judgment was duly rendered, whereby it was adjudged that there was *due* to the plaintiff $6782.49 gold coin of the United States."

This is not an allegation that the judgment "was made payable in gold coin." To allege that there was *due* to the plaintiff gold coin is not equivalent to alleging that the judgment was "made payable in gold coin." The court might have adjudged that gold coin was *due* to Bishop, but at the same time, could not make the judgment "payable in gold coin" because Bishop had failed to so allege in his complaint as required by section 667, C. C. P., for it is only when it is so alleged in the complaint that the court is authorized to make the judgment "payable in a specific kind of money; and there was no evidence at the trial in the case at bar, showing that the Bishop judgment was made payable in gold coin.

Besides, when sale is made, the officer making the sale must give to the purchaser a "certificate of sale" [Section 700, Code Civil Procedure, California]: "and when the judgment under which the sale has been made is made payable in the specific kind of money or currency, the certificate must show the kind of money or currency in which such redemption must be made, which must be the same as that specified in the judgment."

There was no evidence before the court at the trial of the case showing what kind of money was specified in the certificate of sale, and it is not alleged in the complaint that the certificate of sale issued to Hooker required the redemption to be

made in gold coin. [See paragraph 5, amended complaint, Tr. p. 16.]

(b) We would also suggest that where the plaintiff was notified by the sheriff the day the redemption was made, that he had the money for him, and he refused to accept it, he is estopped from denying that it was paid to the sheriff and also estopped from asserting that the check was not cashed by the sheriff. He did not refuse to accept the money because it was paid by a check, nor on account of the amount, but only because he claimed that Rhodes was not a redemptioner. [See original complaint, Tr. pp. 1 to 6.] Hooker was undoubtedly trying to evade the redemption as evidenced by his keeping out of the way when Rhodes made an ineffectual attempt to make the tender to him personally. [Tr. p. 75, O. P. 134, 135.]

After Hooker refused to accept the money from the sheriff, he cannot be heard to say that it was not offered to him. Section 1515, Civil Code (Cal.): "A refusal of the creditor to accept performance made before an offer thereto, is equivalent to an offer and refusal."

(c) We also say that there was a tender of the gold coin to the sheriff by Rhodes when he and Clark went to the sheriff and offered to pay the gold coin, and the sheriff instructed them to bring a certified check as payment instead of the gold

coin. They had the gold coin then at hand and were ready, able and willing to deliver it to the sheriff at once, but the sheriff, the lawful agent of the purchaser "to receive the payment", requested the redemptioner to deliver the certified check, and not the gold coin.

Besides there was a written tender to the sheriff, the agent of Hooker, of the money "in gold coin of the U. S." [See Transcript, p. 98, O. P. 175. See also section 704, Court of Civil Procedure, as follows]: "A tender of the money is equivalent to payment."

Sec. 2076, Code of Civil Procedure (California): "The person to whom a tender is made, must at the time specify any objection he may have to the money, instrument or property, or must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind which he requires, or be precluded from objecting afterward."

See also Freeman on Execution, Sec. 320, as to right of sheriff as agent to waive objections for purchaser.

2. Plaintiff in error claims that payment for redemption could not be made by check; and that though it could be made by check yet the check presented, not being the check of Rhodes, the redemptioner, for that reason it was of no effect.

First, We say that the question as to whether the check was payment, whether the check of

Clark & Bryan was as effective as the check of Rhodes; whether it would make any difference whether the check was cashed at once or later (under the circumstances in this case), as mentioned in the last nine pages of plaintiff in error's brief, are all questions which could be and were decided by the Supreme Court of California, upon the *facts* presented, regardless of and without involving any federal question; and are conclusive, and are not reviewable under the Writ of Error.

But to meet the objection on those points, if the judgment should be reviewed in that regard, we insist that payment may be made by check, and that it is immaterial whose check was presented, just so as it was on behalf of the redemptioner and accepted by the sheriff as such.

The evidence shows that Rhodes and Clark went together and made the redemption, and Clark stated what he did was for Rhodes and as Rhodes' agent. One may do by his agent what he may do for himself [Sec. 2305, Civil Code]. Being a certified check, it really became the check of the bank; for when a check is certified by a bank, it is treated as paid as between the bank and drawer, and the bank becomes liable in the place of the drawer.

Thorn v. San Francisco, 4 Cal. 127, cited by plaintiff in error, is a very early case. On the

point as to the *check* being payment, the case has never been followed by any other case in this state. That decision was made in April, 1854, at the time there were only three judges, and this view was held by only one judge, to-wit: Justice Wells, who delivered the main opinion in the case.

Chief Justice Murray in concurring says: "I concur in the conclusion to which my associate, Justice Wells, has come, but my opinion is based upon the grounds:

"1st. That act of 1851 is prospective in its operation.

2nd. That there was no legal redemption (as it appears from the findings of the court below) made by any authorized person".

Judge Heydenfeldt dissented from the opinions of his associates.

It follows that so far as payment by check is concerned, that being the opinion of only one judge, it was not a part of the decision of the court, and never has been obligatory as law.

Besides, this case was decided at a time when commercial conditions were very different from what they are now.

Business was then generally done by the payment of *cash money*, whereas now nearly all business is done through the banks; and it would be a strict construction in this commercial era, when all business is done by checks and drafts, to say

that payment made by check, where the check is paid on presentation, is not a payment.

"Payment is a transfer of money from one person, the payor, to another, the payee." [Rap. & Law. Law Dict.]

It has been held by various courts of high authority that the delivery of a check, where the drawer has the money in the bank to pay it, and which is afterwards paid, is payment of the money itself. This question is clearly settled by the decision in Buford v. Heinzer, 8 Biss. 177. [The same case is found in V. 4, Federal Cases, page 607.]

The same question is decided and upheld in Jessup v. Carey, 61 Ind. 584, and Carter v. Lewis, 27 Mich. 241, and Webb v. Watson, 18 Iowa 537.

The case in 8 Biss. 177 is full, and the identical point is made. And in it, Judge Gresham says that delivery of the check was payment of the money as the check only answered as the means of transferring the money to the payee.

"A check given in payment which is afterwards paid, becomes a valid payment as of the date of its receipt."

The above is the text of the Eng. and Am. Encyp. of Law, Vol. 1, page 174, on the question of payment; to which there is a very copious note referring to decisions in almost every state in the union.

In 78 Cal. 15, it is held that a check is condi-

tional payment—the condition being that the check be paid, and it constitutes absolute payment, and relates back to the delivery of the check, when the check is paid.

In Poorman v. Woodward, 2 How. (U. S.) 266, it is held that a certificate of deposit constitutes a good payment, if the certificate is duly paid.

In Bridges v. Garret L. R., 5 C. P. 454, it is held that a check given in payment, which is duly honored, is good as payment.

The principle upon which these decisions are based, is that the check is simply the mode of transferring the money from one to another.

All these later decisions show that the theory upon which Justice Wells based his opinion in Thorne v. San Francisco, 4 Cal. 127, is incorrect. In that opinion, the court fails to consider the point that a check is only the means of transferring money. And the reason the justice gives why it should not be allowable, to-wit: that the sheriff's bond might not be good to respond to the purchaser for damages, or that the sheriff might prove a defaulter, is fallacious, in that, if the money was paid, the same results could as easily follow.

The extent to which Sec. 319, Freeman on Executions, goes, is that the sheriff cannot waive

the presentations of the proofs, etc., that the person applying to redeem is a proper redemptioner.

58 Cal. 431, cited by plaintiff, is on the question of rescission. The court incidentally decides that a "two days' check" was not a sufficient *tender*.

There is a difference in what may constitute a sufficient *tender* and what would amount to *payment*.

If the check were accepted as tender it would constitute a sufficient tender; so, if received as payment, it is payment when paid. A check received in payment is always provision or conditional payment; that is, payment provided the check is paid.

While *payment* in the strict legal sense must be in money, a check in payment as a *payment in money when* the check is duly honored—the check being merely the process by which the money is delivered.

There is no dispute on the question that a note or judgment, made payable in gold coin, is not discharged by a tender of money of less value. The question here is, was a check, upon which the gold coin would have been paid on presentation, and upon which it was obtained, a *payment?* Counsel for plaintiff assumes that it was not a payment, because it was not money, ignoring the views taken by all modern decisions that the

check simply represented money and was the means of transferring it. Had it not been for the opinion of Justice Wells in 4 Cal. 127, it is probable that such question would never have been made.

The numerous authorities, cited by appellant on the question of tender, have no bearing upon this case. This is not a question of tender; all these authorities are on the theory that tender and payment must be in money, and a party has the right to reject either if offered by check. But we say, if the check is accepted, it is good as tender or payment, provided it is duly paid. One could not compel another to accept a check as payment, no more than a check would be a good tender. But if the check is accepted, it is a conditional payment—conditioned upon payment of the check—and becomes absolute when the check is paid—the same as money—and the payment relates back and is of the date of the delivery of the check.

The trouble with plaintiff in error is in falling into the error that a *tender* and *payment* are on the same plane; and that a check, given as payment, which *is not paid* is the same as a check given as payment which *is paid*.

The authorities cited by him on this subject refer to *tenders* and to checks or notes given as payment, which were *not paid*. These decisions are not questioned as being good authorities upon the

points in them made, but they are useless to elucidate the question as to whether a check given in payment, which check *is duly paid,* does not constitute a payment. Another distinction counsel for plaintiff in error fails to make is, that where a good check is offered as payment, and *not accepted,* that it is different from when a check is accepted and paid.

Haskell v. Manlove, 14 Cal. 57, and Wilcon v. Miller, 49 Cal. 194, treat simply of the necessity of a redemptioner complying with the statute in presenting the proofs of his right to redeem; and where he failed to produce among the *proofs* a copy of "the docket of the judgment" his proofs were not sufficient.

The substance of Freeman on Executions, quoted by plaintiff in error, is simply to the effect that bank checks, etc., and money which is not *legal tender* cannot be used for payment when they are *objected to* as such. But that authority nor any others (except Thorne v. San Francisco, 4 Cal.) which is the basis of Freeman's text, goes to the extent of holding that a check which is *received in payment,* and which *is paid* is not payment.

The same may be said of Dingley v. McDonald, London and S. F. Bank v. Parrott; Dallapiazza v. Foley, Equitable National Bank v. Griffin & Skelly Co. None of them are at all ap-

plicable to the question before the court, which is: Was the check which was *accepted as payment,* and which check *was duly paid* on presentation at the bank, a *payment?* We say that we do not believe that there can be found a case except Thorne v. San Francisco which holds the doctrine that such check is not payment. Nor does Villhac v. Biven, 28 Cal. 409, have any bearing on the question. In that case there was a fraudulent tender, which was refused and the court held that it was not a payment.

None of these cases cited by plaintiff in error in the last ten pages of his brief touch the question. They all go to the point as to what is not good as tender when it is refused. In other words, what may the creditor refuse to accept as a tender or payment. They do not touch the question as to what is a good tender or a payment if accepted by the creditor.

A check offered in payment of a debt, if objected to and not accepted, would not be good as tender or payment. But if it is accepted by the creditor and afterward paid, it is good as tender and payment.

III.

Plaintiff in error claims that the law in force at the date of the mortgage controlled in the redemption, and not the law which was in force at the date of the sale. That the law passed after the mortgage contract, though before the sale, did not apply, because it impaired the obligations of the mortgage contract.

At the time this redemption was made the statute required one per cent. to be paid on redemption. The law reducing the per cent. to be paid on redemption was passed in 1895. It was in force prior to the date of this sale, but subsequent to the execution of the mortgage. The mortgage was executed some time in 1893; the law reducing the per cent. to be paid on redemption from two per cent to one per cent. was passed in 1895, and the sale took place in June, 1898. Counsel for plaintiff in error claims that the statute of 1895 reducing the per cent. to be paid on redemption is inapplicable, because it would impair the obligations of the contract, that is, the obligations of the mortgage contract which was entered into by Swigart with Mrs. Spencer.

Hooker was not the mortgagee, but was an outsider who purchased at the sale. The case upon which appellant principally relies on this point is Barnitz v. Beverly in 163 U. S. 122, wherein it

is decided that "a statute which authorizes the redemption of property sold upon foreclosure of a mortgage where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage."

The question first came before the Supreme Court of California in Thorne v. San Francisco, 4 Cal. 127, on the power of the legislature to give the right of redemption where none previously existed as to an ordinary execution sale. There it was held that the right of redemption could not be given where the law giving it was passed after the judgment, but before the sale. The opinion in that case was by Justice Wells and concurred in by Chief Justice Murray; but Justice Heydenfeldt delivered a very able dissenting opinion.

The same point again arose in Seale v. Mitchell, 5 Cal. 403, in which Thorne v. San Francisco was approved. But the approval was based upon the principle of *stare decisis,* so stated by Justice Heydenfeldt in delivering the opinion of the court. The subject (though not the exact question as in Thorne v. San Francisco) next came up in Tuolumne R. Co. v. Sedgwick, 15 Cal. 515. In this case, for the first time, the identical question as to reducing the per cent. to be paid on re-

demption in mortgage foreclosure sale, came before the court. Here the law was passed after the execution of the mortgage, and before the sale, reducing the per cent. from six per cent. to four per cent., and Thorne v. San Francisco was in effect overruled, and the dissenting opinion of Justice Heydenfeldt in Thorne v. San Francisco was approved and followed, and the principle settled that the law passed, after the mortgage, but before the sale, applied and governed as to the per cent. to be paid.

The question next came up in Moore v. Martin, 38 Cal. 428. The question in that case was allowing redemption from an ordinary execution sale where no right of redemption existed prior to the contract upon which the judgment was obtained.

Here Thorne v. San Francisco was distinctly overruled, and Tuolumne R. Co. v. Sedgwick was approved—the court holding: That a law giving the right of redemption in ordinary execution sales, passed after the contracts were executed and even after judgments, but before the sale, did not impair the obligations of the contract.

Thus the rule in California was established, and has existed in this state up to the present time, that to reduce the per cent. to be paid on redemption, by a law passed before the sale does not impair the obligations of the contract.

These early decisions, here quoted, have not been overlooked by the Supreme Court of California in later cases. In Oullahan v. Sweeny, 79 Cal. p. 539, Tuolumne R. Co. v. Sedgwick and Moore v. Martin are cited with approval.

Also in Teralta Land Co. v. Shaffer, 116 p. 523, both of said cases are again cited with approval. And in Allen v. Allen, 95 Cal 205, Chief Justice Beatty, in his dissenting opinion, refers to the dissenting opinion of Justice Heydenfeldt in Thorne v. San Francisco as authority and the law of California.

Therefore we say that it is not an open question in California, but that it has been the settled law of that state since the decision in Tuolumne R. Co. v. Sedgwick, 15 Cal., year 1860, that a law passed before the sale of property under a mortgage foreclosure (though after execution of the mortgage) reducing the per cent to be paid on redemption is valid, and does not impair the obligations of the mortgage contract.

This view of the law, established by the Supreme Court of California, has been sustained and approved by a decision of the Supreme Court of the United States in Conn. M. L. Ins. Co. v. Cushman, *supra*, and these decisions have never been denied or overruled by any decision of the Supreme Court of California or of the Supreme Court of the United States. So, we find, that

up to the present time, it is so established as a rule of law by the California Supreme Court and by the Supreme Court of the United States.

In Barnitz v. Beverly this court say: "The case of Conn. M. L. I. Co. v. Cushman, 108 U. S. 51, does not collide with the previous and subsequent cases."

This is an approval in Barnitz v. Beverly, of the Conn. M. L. I. Co. v. Cushman, and a direct declaration that it is not in conflict with that case.

The case of Teralta Land etc. Co. v. Shaffer, *supra,* is not in conflict with Tuolumne R. Co. v. Sedgwick nor with Conn. M. L. I. Co. v. Cushman. In the Teralta Land Co. case the question was whether a law passed *after the sale* would be applicable, showing that the Supreme Court regarded that the contract of the purchaser commenced at the sale. And to further emphasize this view, the court in that case say: "The right of property acquired by the purchaser at this sale and the right of redemption remaining in the owner must both be governed by the law in force *at the time of the sale.*" And further in the same case the court say: "The enforced sale of property on execution, or for non payment of taxes, constitutes a contract with the purchaser which cannot be materially altered without his consent." Also in Blood v. Light, 38 Cal. 658; Hammond v. Cailleaud, 111 Cal. p. 220, and

Thesher v. Atchison, 117 Cal. p. 75, this court held that a sheriff's sale is regarded, in law, as a sale by the judgment debtor, and the purchaser's contract commences with the sale.

Appellant places stress upon the expression in Thesher v. Atchison, *supra,* that "the same principles which render void an act extending the time for redemption after the sale has been made, will render void an act reducing the amount of money required for a redemption from such sale."

This is true. But it should be considered in connection with what the court in the same opinion further say, to-wit: "The sale by the sheriff is regarded as a sale by the judgment debtor; and the purchaser is entitled to rely upon the statutory provision for redemption *existing at the time of the sale* to the same extent, and in the same manner as if they were incorporated into a contract of sale executed by the debtor."

Also it is true that the same principles which would render void an act shortening the time of redemption would render void an act increasing the amount of money required for redemption from such sale. An act reducing the amount or extending the time would have a direct and necessary legal operation upon the obligations of the *contract of purchase,* but not upon the original debt contract; while an act increasing the amount, or shortening the time would have a direct and necessary legal operation in its effect

upon the *rights of the mortgagor* under the mortgage contract.

It was held in McCracken v. Hayward, 2 How 608, that, "The obligation of a contract is its *binding force* on the *party* who makes it."

The obligation or *"binding force"* of the mortgage contract between Swigert and Mrs. Spencer was that Mrs. Spencer would pay the debt according to the terms of the note, and she hypothecated as security for the performance of this obligation a certain estate in the property—that estate being, that if the debt should not be so paid Swigert may sell the property and the purchaser thereof should go into possession after the expiration of six months.

The key to the solution of this question and upon which all these decisions may be reconciled and any supposed conflict which may seem to exist between them may be avoided, is found in the following language from the opinion in Conn. Mutual Life Ins. Co. v. Cushman, *supra*, to-wit: "The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their *direct or necessary legal operation controlled or affected the obligations of such contract.*" The law which is passed after the mortgage contract is executed granting to the mortgagor the right of redemption, when none previously existed, does, in its *direct and necessary le-*

gal operation, affect the obligations of the mortgage contract in this, that it takes from the mortgagee a part of the estate which is bound to him under the contract as his security. There is the obligation on the part of the mortgagor that on default of payment, the mortgagee may sell the estate and go into possession. Where the time of redemption is given under such circumstances, a portion of the estate which is actually delivered as security under the mortgage contract is carved out of it, and consequently the law has a direct and necessary effect upon the obligation of the mortgage contract.

The binding force of the mortgage contract is, that the entire estate is pledged as security. So if a law is passed subsequently, reducing the estate, it affects the obligation that the entire estate may be sold for the payment of the debt. So also if the time for redemption is extended it adds to the estate in favor of the mortgagor, and takes from the mortgagee a portion of the right which has been secured to him under his contract. But as to the per cent. to be paid on redemption it is different. There is no obligation of the contract that the mortgagor will redeem. The only obligation that exists, in the mortgage contract, is, if the mortgagor does redeem, that he shall not be required to pay more than two per cent. That is the obligation that rests upon the mortgagee. But there is no binding force in the mortgage

contract that the mortgagor will redeem at all. He has the right of redemption. It is a privilege which he can exercise at his will, but there is no obligation upon him to redeem. So, the law changing the per cent., enacted after the execution of the mortgage, does not *directly* control or affect any of the obligations of the mortgage contract. If it affects it at all, it is remote and indirect, depending upon contingencies. One of the contingencies is that there must be a sale; also that the property may not at the decretal sale bring enough to pay the debt. . In Murphy v. F. & M. Bk., 13 Cal. p. 120, this court said: "Presumably, mortgage property would have a market value greater than the mortgage debt, the lender would rarely loan up to the full cash value." Also another contingency is that the mortgagor would redeem. But the Supreme Court of the United States in 108 U. S., *supra,* say that these contingencies may never happen, and that they "are too remote to justify the conclusion as a matter of law, that such legislation affected the valuation of the mortgage contract;" or that the parties contracted with reference to them.

It is unquestionably a fact that the laws of the state, at the time a contract is made, so far as they in their *direct and necessary legal operation control or affect the obligations of the contract,* enter into the contract and become a part of it.

But the laws of the state, which may ultimately upon some contingency affect the obligations of the contract, but do not in their *direct and necessary operation* affect its obligations, do not enter into or become part of the contract.

When we take a sale under a mortgage foreclosure we find the questions of costs enter into the ultimate results; but they are remote, and consequently those questions as to what it would cost to file suit, or for the sheriff to serve papers, or for the sheriff's certificate of sale and deed, could not be regarded, as a matter of law, that the parties contracted with reference to them, on account of the remoteness of their effect. It could not be held that where a note is given that the redemption laws enter into and form a part of the contract of debt. In Haynes v. Tredway, 133 Cal. p. 401, the court assumes a distinction between ordinary execution sales and sales under mortgage foreclosure.

We say that where Conn. Mutual Life Ins. Co. v. Cushman is distinctly cited and commented upon in Barnitz v. Beverly, with approval, and there stated that it does not conflict with Barnitz v. Beverly, we have been at a loss to understand wherein there could have been any question upon this point.

The construction given to law by the highest courts, is the law of the land to the same extent as legislative enactments; and remains so until

overruled; and the laws so declared by the highest courts form part of contracts the same as statutes. Now, the law of the land at the time this mortgage contract was made, as construed by the Supreme Court of California and by the Supreme Court of the United States, was that the legislature has the power and authority at any time before a sale, to change the per cent. to be paid on redemption. And if the contention made by counsel for the appellant is correct, that all the laws would enter into the contract, then that law must have entered into the contract and become a part of it, and the parties contracted with reference to the law which gave the legislature the right to change the amount of per cent. to be required on redemption at any time before the sale; and if that law entered into the contract, then it cannot be said that the obligation of the contract was impaired by the subsequent law, because, as stated in the opinions which were rendered in those cases, the creditor must look to the law at the time of the sale to see what the right of redemption is and what the per cent. is that is to be paid.

In regard to the amount to be paid on redemption, it is held in Robertson *et al.* v. Van Cleave *et al.*, 129 Ind. 217-231, (same case found in L. R. A., vol. 15, p. 68), that the statute reducing the rate of interest to be paid on redemption from a foreclosure sale does not impair the obligation

of a contract where the rate to which it is reduced is not lower than the rate of interest agreed upon in the mortgage. In this case the case of Con. M. L .Ins. Co. v. Cushman is considered and followed.

Quotations from Con. M. L. I. Co. v. Cushman and Barnitz v. Beverly would not be amiss, to show the reasoning of the court, and also that the case of McCracken v. Hayward, and others on the same line, were considered.

The following is quoted from the opinion in Con. M. L. I. Co. v. Cushman:

"The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the purchaser should bear as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when he received what the mortgage and the statute in force when the mortgage was executed, entitled him to demand.

"The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. *The company ceased to be a mortgagee when* its debt was merged in the decree, or, at least, when *the sale occurred.* Thence forward, its interest in the property was as purchaser, not as mortgagee.

And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by statute, at the time of purchase, does not, in any legal sense impair the obligation of its contract as mortgagee. It assumed the position of a purchaser subject, necessarily, to the law then in force defining the rights of purchasers."

"But it is insisted that the value of the mortgage contract was impaired by a subsequent law reducing the interest to be paid to a purchaser at the decretal sale; this, upon the assumption that the probability of the debt being satisfied by the decretal sale of the property, was lessened by the reducing of the interest which any purchaser could realize on his bid in the event of redemption. In other words, the reduction, by a subsequent statute, of the interest to be paid to the purchaser would, it is argued, necessarily tend to lessen the number of bidders seeking investments, and thereby injuriously affect the value of the mortgage security."

"In support of this proposition counsel cite several decisions of this court, in which it is ruled that the objection to a law, as impairing the obligation of a contract, does not depend upon the extent of the change it effects; that the laws in existence when a contract is made, including those which affect their validity, construction, discharge and enforcement, enter into and form a part of it, measuring the obligation to be performed by one party, and the rights acquired by the other; and that one of the tests that a contract has been impaired is that its value has been diminished, when the constitution prohibits any impairment at all of its obligation. Green v. Biddle, 8 Wheat. 1; McCracken v. Hayward, 2 How. 612; Planters' Bk. v. Sharp, 6 Id. 327; Edwards v. Kearxey, 96 U. S. 601 (XXIV, 796)."

"These decisions clearly have no application to the case now before the court. The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their direct or necessary legal operation controlled or affected the obligations of such contract. We have seen that no reduction of the rate of interest, as between the purchaser of mortgaged property at decretal sale and the party entitled to redeem, affected or could possibly affect, the right of the insurance company to receive, or the duty of the mortgagor to pay, the entire mortgage debt, with interest as stipulated in the mortgage up to the decree of sale. And the result of the sale, in this case, shows that the company, as mortgagor, has received all that it was entitled to demand. The reduction of the rate of interest by the act of 1879 was by way of relief to the mortgagor and his judgment creditors, and in no sense an injury to the mortgagee."

"When that act was passed, there was no person to answer the description to claim the rights of a purchaser; consequently no existing rights were thereby impaired."

"That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur, unless there was a decretal sale, nor unless the mortgagee became the purchaser; and are too remote to justify the conclusion, as a matter of law, that such legislation affected the value of the mortgage contract."

It can be seen that Barnitz v. Beverly might be applicable to Allen v. Allen, as, in both the ques-

tion arose as to the effect of subsequent statute upon the original *contract* of the *parties*. In Allen v. Allen, it was a question of extending the Statute of Limitations for suit to redeem, and in Barnitz v. Beverly, it was a question of allowing a redemption where none existed at the time the contract was made.

But in Con. M. L. I. Co. v. Cushman, the question involved is the rights of the purchaser.

In that case, the court holds that the contract of the purchaser does not exist until after the sale, and the decision is consistent with both Allen v. Allen and Barnitz v. Beverly. It has never been held by the Supreme Court of California, nor by the Supreme Court of the United States that the purchaser had any contract until after the sale; and consequently the obligations of his contract could not be affected by legislation prior to the sale, except so far as it affected the *title* to the property purchased.

In Con. M. L. I. Co. v. Cushman, this court say, that the mortgagee's rights under the original contract cease at the sale, and if he purchases at the sale he stands as any other purchaser.

Referring to the Con. M. L. I. Co. v. Cushman, in Barnitz v. Beverly, this court say:

"The case of Con. M. L. I. Co. v. Cushman, 108 U. S. 51, does not collide with the previous and subsequent cases. There the new statute did

not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of the payment, nor affect any remedy which the *mortgagee* had by existing law for the enforcement of his contract. Neither is the case of Morley v. Lake Shore & Michigan Southern Railway Co., 146 U. S. 162, in any wise inconsistent with the cases above cited."

After stating the conclusion reached in Barnitz v. Beverly, the court goes on to say:

"Let us briefly apply the conclusions thus reached, to the facts of the present case," then the court goes on to apply the facts as follows: "The plaintiff was the holder of several promissory notes, dated November 1st, 1885, secured by a mortgage of the same date upon a tract of land in Shawnee county, Kansas. The mortgage contained an express waiver of an appraisement of the real estate. Default in payment having ensued, the suit was brought, praying that the mortgaged premises should be sold according to law, without appraisement, that the proceeds arising from the sale should be applied to the payment of the indebtedness due the plaintiff, and that the defendants should be forever barred and precluded of any right of redemption. Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed, and the sheriff's deed issued. Thereafter the mortgagor or owner had no possession, title or right in any way, to the premises.

"Under the new law, the mortgagor shall have eighteen months from the date of sale within which to redeem, and in the meantime the rents, issues and profits except what is necessary to keep up repairs, shall go to the mortgagor or the

owner of the legal title, who, in the meantime, shall be entitled to the possession of the property. The redemption payment is to consist not of the mortgage debt, interest and costs, but of the amount paid the purchaser with interest, costs and taxes. In other words, the act carves out for the mortgagor or the owner of the mortgaged property, an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged (described in the mortgage as a good and indefeasible estate of inheritance, free and clear of all incumbrances), but a remainder —an estate subject to the possession, for eighteen months, of another person who is under no obligation to pay rent or to account for profits. The twenty-third section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem. Obviously, this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect, release the debtor from his personal obligation. We of course have nothing to do with the fairness or policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction, that such a change in the law is not merely the substitution of one remedy for another; but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate

is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises, subject to an estate or right of possession in debtor or his alienees for eighteen months? Martha Barnitz held Kirtland's notes, secured by mortgage. Of course, under the contract thus created, she had a right to resort to other property of the debtor to make up for any deficiency remaining after the sale of the real estate mortgaged. As the law stood at the time the contract was made, if Kirtland, either by purchase at the sale or by subsequent transactions, became the owner of the real estate, Mrs. Barnitz had a legal right to again levy thereon and subject it to the payment of the remnant of her debt. But this law, as we have seen, in express terms, declares that this real estate shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold. This cannot be held to mean merely that the land is sold free from existing liens, for such would be the legal effect of the sale, at any rate. It plainly means that the balance of the debt shall not be made out of the lands, even if and when they become the property of the debtor. Nor can it be said that such a question is not now before us. What we are now considering is whether the change of remedy was detrimental to such degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act does deprive the plaintiff of a right inherent in her contract. When we are asked to put this case within the rule of those cases in which we have held that it is competent for the state to change the form of the remedy, or to modify it

otherwise, as they see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties."

It is plain to see from these two cases [Conn. M. L. I. Co. v. Cushman, and Barnitz v. Beverly], that there is no general rule that applies to every case, but that each case depends upon its own facts, and that the legislation objected to applies or does not apply to the particular case, according as there is a right impaired or not. In other words, if the party complaining of the operation of the law is not injured by it, and if the obligations of *his* contract are not impaired, the law will apply and operate. In the case at bar, the party complaining is simply a purchaser, but he is claiming, as such purchaser, that the obligations of the contract between Swigart and Mrs. Spencer were impaired by this law. He occupies no relations to those parties, and is not in as favorable position to complain as the plaintiff was in the Conn. M. L. I. Co. v. Cushman.

But counsel for appellant argues that Hooker had the right to assume that the laws at the date of the original contract applied, and that he bought, expecting to get 2 per cent. interest and not 1 per cent. on redemption. But that is answered by the statement that, when he bought,

he knew that the law allowed only 1 per cent. instead of 2 per cent., and that he bought subject to the laws in existence at the time of his contract. He is therefore not injured by the operation of this law.

Neither Swigart or Bishop could complain that the act of 1897 was inapplicable, because they received all that Mrs. Spencer obligated to perform. Then how could a stranger to the mortgage contract be heard to complain because, in some uncertain contingency, Swigart might have been injured?

In Brine v. Insurance Co., 96 U. S. 637, the court say: "All the laws of a state existing at the time a mortgage or any other contract is made which affect the rights of the *parties to the contract,* enter into, and become a part of it."

If the obligations of a contract consist in its binding force upon the *party making it,* and the laws which become a part of the contract are those which affect the rights of the *parties to the contract,* how can it be said that to reduce the amount of the redemption money would come within the perview of these decisions?

These rights and obligations of the contract of Spencer to Swigart were fully secured and performed, and were in no sense affected by the law changing the per cent. to be paid on redemption; nor was the estate purchased by Hooker in the least affected by it.

But in the case of Barnitz v. Beverly the changes in the law prevented the sale of the entire estate mortgaged, and kept the mortgagee from the enjoyment of the estate purchased at the sale, for eighteen months, without any right to the rents or possession. The estate to be sold under the new law was different from that authorized by the mortgage, and the time of the enjoyment delayed. The *reasons* for the decision in Barnitz v. Beverly and the distinction between it and the Conn. M. L. I. Co. v. Cushman could not be better given than to read what we have before quoted from those cases.

Where there is no redemption, none can be given by subsequent statute, because it changes the conditions of mortgagee's rights. Where the right of redemption exists, it is not a right of the mortgagee, except so far as it cannot be extended, but the *right* of the mortgagor, and the time in which to redeem cannot be shortened as against him, because it is his right to redeem and that would impair his right.

Sale by the sheriff being regarded in law as a sale by the judgment debtor, when a sale occurs, it is a new contract, and has no relation to or connection with the original contract.

The amount to be paid by the purchaser is not the amount of the judgment, but is the amount of his bid, his contract. It may be more or it may be less than the judgment. And the amount

to be paid on redemption is measured in the same way, not by the original contract, but by the contract of the purchaser.

Duff v. Randall, 116 Cal. 230.

The case of Thrasher v. Atchison, 117 Cal. 73, has reference only to the effect of laws passed *after* the *sale.*

There the court say: "The provision in the law (to pay 2 per cent.) forms an element in the purchase at the sale, and constitutes a term in the *contract under which the purchaser paid his money* to the officer. *At the time of his purchase,* the statute provided that at the expiration of 6 months thereafter, he should receive a conveyance of the land, unless it should before that time, be redeemed from the sale by the payment to him of the amount of his purchase, with 2 per cent. per month until the time of such payment, * * *

"By the purchase, Greene became vested with an interest in the land, of which he could be deprived only by the mode *then* fixed by law."

The case of Teralta Land Co. v. Shafer, 116 Cal. 518, is to the same effect and has reference only to the contract of *purchase.*

It will be seen that these decisions are based upon the question as to disturbing the rights of the purchaser *after* his *contract* of *purchase.* Neither of them pretend to hold that the purchaser has any contract or right, or rights in any contract prior to the sale.

There is no claim that the statutes have a retro-

active operation. This claim is not necessary for the operation of our statute upon the contract of purchase. Nor is such claim essential to the harmony of the great weight of authorities on the subject. On examination of the authorities, it will be found, that it must appear a *contract right* has been impaired to make the law inoperative.

A law that impairs a vested right is inapplicable and inoperative as to the right which is impaired. A statute passed *after* the sale, extending the time or diminishing the amount of redemption would be inoperative as to the purchaser; because it would impair his rights; but would be operative and valid against the debtor because his rights would not be impaired. So, a statute passed after the sale or even after the original mortgage contract, shortening the time and increasing the amount of redemption would be inoperative as to the mortgagor, as it would impair his right in the privilege of redemption. But the mortgagee would not stand on the same ground, because redemption is not his right.

The claim of counsel for appellant that a sale, under a mortgage foreclosure, relates back to the mortgage as a muniment of title does not change the rule. The same is true of sales under judgment, where there has been attachment. He had just as well claim that the purchaser, at a com-

mon law sale, could claim the levy of the attachment as a part of his contract of purchase. While the sale relates back to the levy of the attachment so far as to protect the title, the contract of the purchaser only dates from the sale, in every instance.

IV.

A general review, in answer to the argument and authorities of plaintiff in error on the question of reducing the per cent.

We deem it a useless task to follow counsel of plaintiff in error through the first pages of his argument on the question "That the laws in force at the time of the contract enter into the contract", as the highest judicial determination of that question was made in the case of Con. M. L. I. Co. v. Cushman, and it was there stated what laws "enter into the contract."

It is not that all the laws of the land enter into the contract, but only those which may be legally assumed to have been contemplated by the contracting parties. Bronson v. Kenzie, 1 How. and McCracken v. Hayward, 2 How., are the leading cases which first give rise to this subject of litigation—the *impairment* of the obligations

of contracts. Perhaps, there are not in the books a case which furnishes more encouragement to those who assert that the "obligations of contracts are impaired" than the case of McCracken v. Hayward. And it has proven a fruitful source of litigation, from the fact, that in it general principles, upon the subject are laid down, and it has been the pillar of support in all this class of cases since its rendition.

But we find that this valuable authority has been misinterperted by the profession and has often caused questions of this character to be raised which could not be sustained on principle or on that authority. It seems to have been relied on by the company in Con. M. L. I. Co. v. Cushman, and there this court took occasion to distinguish it, and show that it did not apply.

There is no question that the *remedies* cannot be changed to such extent as would *impair* the rights of the *parties* under their contract.

Remedies may be changed at the will of the state, provided no substantial right secured by the contract is *impaired.*

And without criticising each case on this subject, cited by plaintiff in error, it is enough to say that in all of them where it has ever been held that the law would not apply, that the operation of the law would work a substantial injury to the *party* to the contract.

The same may be said of all the authorities cited by plaintiff in error on pages 17 to 23 of his brief.

Further, none of the authorities cited by plaintiff in error on the subject of the *title* of the purchaser—that the *title* relates back to the mortgage, and that the "purchaser stands in the shoes of the mortgagor" bear upon the question before the court, except so far as they show that the *title* relates back to the mortgage or judgment.

There is no dispute between us that the *title* of the purchase at foreclosure sale relates back to the mortgage; and also at execution sale, it relates back to the judgment; also where there has been attachment, it relates back to the attachment.

These authorities are so palpably foreign to the question before the court, that we deem it consuming time to take them up *seriatim.*

Benson v. Bunting, 127 Cal. 532, Malone v. Ray, 134 Cal. 344, and Haynes v. Treadway, 133 Cal. 400, cited by plaintiff in error, merely follow Barnitz v. Beverly and are based upon it for authority, and do not assert any new principle.

On page 33 of his brief plaintiff in error says, "That no distinction can be made between the time of redemption and the amount to be paid for redemption. That is certainly the rule in this state."

We beg to differ with counsel and say that such is not the rule in California. The distinction has been sharply drawn in this state by the *decisions.* Ever since the case of Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515, to the present time it has been the rule in this state that the per cent. to be paid on redemption may be reduced *before* the sale.

The distinction is based upon the same principle stated in Con. M. L. I. & Co. v. Cushman, to-wit: the contract of the purchaser commencing *at the sale,* he has the right to rely upon the law as it existed *then;* and that the redemption laws *which do not affect* the mortgage contract are not a part of that contract, and may be changed.

On page 34 of plaintiff in error brief, after citing Teralta Land Co. v. Shaffer and Thrasher v. Atchison, he says:

"We are not citing these cases as determining anything as to what the contract of Hooker, the appellant, is. We only say that whatever may be the contract, it is, by the decisions of the Supreme Court of California, determined that the laws for the redemption of property from the sale, existing at the time the contract is made, are a part of the contract, and that any law either extending or shortening the time of redemption or increasing or diminishing the amount to be paid, is in violation of that contract."

The answer to his statement is:

First, that he is in error as to his premises; the Supreme Court of California has not "deter-

mined" that the *redemption laws* existing at the time the original contract, are a part of that contract; nor has the Supreme Court of California decided that to increase or diminish the amount to be paid on redemption impairs the mortgage contract. Not one of the authorities cited by plaintiff in error sustains that proposition.

What the Supreme Court of California has decided is this: "That a law reducing the amount to be paid on redemption or extending the time of redemption passed *after* the sale is void as to the purchaser, as impairing his contract of purchase. [Teralta L. Co. v. Shafer, Thrasher v. Atchison.] Also that a law *extending* the time of redemption is void as to the original contracting *parties*, because it impairs said contract.

Benson v. Bunting;
Malone v. Ray;
Haynes v. Treadway.

The only privity Hooker, as purchaser, has with the original contract is so far as may be necessary to protest the *title* of the mortgaged property; and for that purpose the title purchased by him relates back to the mortgage.

Now, if a law passed after the mortgage contract, affected the title to the property such as carving out of it a life estate to the mortgagor;

or an estate for years; the purchaser would be in such privity with the mortgage contract as to protect his purchase, though his contract would not commence until the purchase; because such law would affect the title of the mortgaged property. Extending time of redemption also affects the title of the mortgaged property, because it takes from the mortgagee a right to the possession within a certain time, which is a portion of the estate pledged, and consequently takes away a part of the estate purchased. He has a right to have possession of the property within a specified time after sale, and to extend that time takes away that right. And this is true whether the law is passed before or after the sale. But the purchaser has no right to the money to be paid on redemption until he becomes a purchaser at the sale.

So, we see, that the rights under the mortgage contract which may be invoked by a purchaser are only such as affect the *title* to the mortgaged estate.

To reduce the interest to be paid on redemption does not in any sense take from the mortgagee any of the security pledged, nor lessen its value, nor in any degree diminish the obligations of the mortgagor to pay the debt; nor affect the *title* to the mortgaged premises. All of these are still secured to the mortgagee and purchaser. Certainly then the purchaser could not complain

where the law does not take from him any right. He still has the right to the property to the full extent as it was mortgaged; the same time to enter into possession, with no diminution of the estate pledged.

The statement made by the plaintiff in error that the "redemption laws" enter into and form a part of the mortgage contract is too broad. All the redemption laws do not enter into the contract. It is only such laws "which in their direct and necessary legal operation controlled or affected the obligation of the contracts."

There is no conflict between Con. M. L. & Co. v. Cushman and Barnitz v. Beverly; nor is there "involved a complete contradiction of terms" in the opinion of Justice Hnshaw in this case; nor is the case of Barnitz v. Beverly or the cases in California decided incorrectly.

In the first place it may be stated that the contract of the purchaser commences *in all cases at the sale.*

Also it may be said that only those laws which in their *direct and necessary legal operation control or affect* the contract, enter into it.

Also it may be said that no one can complain of the operation of a law who is *not injured* by its operation.

That extending the time of redemption affects the *title* to the property, as it places a *condition* upon the enjoyment.

That reducing the per cent. to be paid does not affect the *title* to the property nor any *obligations of the mortgage* contract.

Even though it should be contended, that under some circumstances, the mortgagee might complain of a law reducing the per cent. to be paid on redemption, passed before the sale, as tending to impair his mortgage contract, yet the purchaser (other than the mortgagee) could not complain of such law as he cannot invoke any right of the mortgage contract except such as affects the *title;* but must look to the law of the date of the sale as to the per cent. to be paid.

Also that the purchaser may invoke the obligations of the mortgage contract to protect his *title,* and no more (though his contract did not begin until the purchase).

This right could be exercised as to any law which affects his *title.* A law saying that the last mortgage takes precedence could be objected to by the purchaser, but a law directing how the mortgage should be foreclosed could not. A law placing a tax upon mortgage might be objected to by the mortgagee; also a law placing the costs of filing a suit at a prohibitory amount; also a law requiring the mortgagee to pay 2-3 of the amount of his mortgage to the sheriff as expense of a sale. But in none of these instances could the *purchaser,* as such, invoke the rights of the mortgagee. But any law

which affected the *title* to the property purchased could be objected to by the purchaser, and he could, for the purpose of protecting his *title*, stand in the shoes of the mortgagee.

Justice Henshaw, who rendered the opinion in this case, did not make a mistake (as stated by plaintiff in error, page 39 of his brief) in saying that since the case of Tuolumne R. Co. v. Sedgwick, 15 Cal., that the rule in California has been contrary to that contended for by plaintiff in error. We say that the statement by the learned Justice was absolutely correct, and that plaintiff in error has not, and cannot produce a single decision to the contrary.

In the case of Thorne v. San Francisco, the question was not the same as presented here, and consequently not the same as presented in the Con. L. I. & Co. v. Cushman; nor was it the same as presented in Barnitz v. Beverly. The question in the Thorne case was whether under ordinary execution sale a law passed after the contract for the debt, but before the sale, giving a right of redemption where none existed at the time the debt was contracted, was valid. In that case the law was held invalid.

That case is not in accord with the Cushman case, nor is it the same principle as Barnitz v. Beverly. And the Thorne case has not been followed in California, nor has the question there

decided been approved by any decision of this court.

The principle upon which the case of Barnitz v. Beverly was decided is obviously different,—being a mortgage contract, wherein certain property was pledged as security which the subsequent law affected by taking away a part of it. And while the question was not identical with Allen v. Allen, 95 California 184, the principle decided there was the same—being that a law subsequent to the mortgage extending the statute of limitations in which the mortgagor may sue to redeem, was not operative—in other words, a law extending the time to redeem, passed after the mortgage contract. The decisions of the Supreme Court of California, as to questions decided on this subject have not, in the least fluctuated since the case of Tuolumne R. Co. v. Sedgwick. There may be at times, in some of the opinions, expressions by the Justices showing doubt upon some proposition connected with the subject. But the *decisions* have been uniform, and in no case was the correctness of the Tuolumne case ever doubted.

If none of the California cases drew a distinction between the question of *reducing the per cent.* and *extending the time* it was because the question never arose. In Thrasher v. Atchison and Teralta L. Co. v. Shafer, the *principle* was the same whether the per cent. was reduced or

the time extended, because it had reference to a law passed *after* the sale. In Allen v. Allen, the question of per cent. did not arise,—that case having reference only to extending the time. So, we see that the occasion for the Supreme Court of California to refer to the difference, upon principle in these two questions never arose until this case.

There is one thing in the Tuolumne case which is worthy of notice; that in discussing the power of the legislature to change the laws, the language of the opinion has reference to the particular facts of that case. Note the following:

"The act of 1851 gave the right (to redeem) to a judgment creditor. If before he is a judgment creditor, the law is repealed, he could not have any claim redeem."

Again:

"The plaintiffs here had not at the time of this repeal or alteration so availed themselves, and therefore the law as to them might be repealed. The effect of this alteration not being to divest any right they had but only to prevent them from having a right, which, before that time they might have had."

The foregoing is quoted to show what the court had in mind when the expression quoted by plaintiff in error from the opinion was used.

There is no question as to the power of the legislature to regulate the redemption of property on foreclosure sale. And it may change

such laws at any time provided the obligations of contracts are not impaired. It may prescribe as the rule of redemption that the mortgagor may redeem upon paying one per cent., and that judgment creditors shall pay two per cent. And that where the law at the time of the mortgage requires the payment of only one per cent. it may thereafter, before the sale, be changed so as to require the payment of two per cent., and the law would be valid as against all persons except the mortgagor.

Counsel on page 49 of his brief says:

"There is an expression in the Cushman case, not easily reconcilable with the decision, and quotes that portion wherein it is said:

" 'The mortgagor might perhaps have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage,' and counsel says if the statute could be invalid as to the mortgagor it must be invalid to the mortgagee." And on page 53 he says that if the power to change the amount paid upon redemption exists at all it must be unlimited, having in mind doubtless the statement which occurs in the opinion McCracken v. Hayward, 43 U. S. 2 How. 608, and quoted in Barnitz v. Beverly, 163 U. S., that if the power to impose conditions upon the sale exist at all, it may be exercised to any extent. The same

conclusion, however, does not follow at all as to the power to change the interest to be paid upon redemption.

The expression quoted by counsel from the Cushman case was doubtless made to prevent misconception as to the extent of the decision, as the question was not involved, and inasmuch as the reduction in this case was not to an amount less than the interest stipulated for in the original loan, it is not necessary to the decision of this case that the court should decide whether a reduction below such stipulated interest would impair the obligations of the contract. But as the question of the power being unlimited may have some bearing upon this discussion we wish to suggest that there is an essential difference between the extension of the time for redemption or the imposing of burdensome conditions upon the sale, and the change in the rate of interest to be paid upon redemption.

In the former case, the subsequent law as applied to existing mortgages instantly operates upon them by enlarging the estate of the mortgagors or by restricting the remedy, and hence necessarily impairs the obligation of all existing mortgages by retarding or postponing or restricting the enforcement of the obligation.

But a subsequent law reducing the penalty or interest upon redemption may or may not affect the right of a mortgagee to receive a certain in-

terest on his money or get the property in case he purchases the same (assuming that his relation after purchase is that of mortgagee and not simply that of purchaser). If his stipulated interest is 8 per cent. per annum and the reduction leaves 1 per cent. per month, he would still in case of redemption get more interest than his contract originally called for. Whether his rights would be impaired in the constitutional sense if the penalty was reduced to an amount less than his stipulated interest or less than the statutory interest after judgment, need not be discussed, as it is not material here, but if such result were admitted, for argument's sake, still it does not follow that a law, such as that under discussion, which did not so reduce such penalty would be unconstitutional.

These rights, as we have stated, are to receive his money with stipulated interest—8 per cent. up to judgment and 7 per cent. after judgment up to the sale of the property—by reducing the penalty for redemption from 2 per cent. to 1 per cent. per month he is not injured in any way, he would still upon redemption get more than his contract stipulated for in the way of interest. The enforcement of his contract is not in any way postponed or retarded and the efficiency of his remedy is not in any way relaxed. No new estate is created, nor is it diminished or enlarged.

In Antoni v. Greenhow, 107 U. S. 769, 27 S. E. 468, after stating the general rule, that the laws applicable which are in force enter into and form a part of the contract, the court says:

"But it is equally well settled that changes in the form of action and mode of proceeding do not amount to an impairment of the obligations of a contract if an adequate and efficacious remedy is left.

"It is competent for the state to change the form of the remedy or to modify it, otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. In all such cases, the question becomes therefore one of reasonableness, and of that the legislature is primarily the judge. [Jackson v. Lamphine, 3 Pet. 290; Terry v. Anderson, 95 U. S. 633.] We ought never to overrule the decision of the legislative department of the government unless a palpable error has been committed."

It is admitted on all sides as before stated, that the *remedy* may be changed. It is also conceded that such changes must not be such as not to leave an adequate *remedy* to enforce. And where the change in remedy is such as to substantially depreciate the value of security, that such would be in violation of the constitutional provision.

Yet if the change in the remedy was such as to impair the rights under the original mortgage contract, even such as taking away all per cent. to be paid on redemption, a purchaser who buys after such law is passed, must stand by his contract

of purchase, and cannot avail himself of the rights of the mortgagee to object to the law. Why?

Because his contract begins at the sale; he must look to and be governed by the laws as they exist at the sale, for his rights; and the reducing the per cent. does not affect the *title* to the property purchased, nor in any sense lessen his estate.

V.

Where redemption is attempted in good faith, and the correct amount paid as required by the law as construed by the highest courts, a change in the construction of such laws should not forfeit the redemptioners. But he should be allowed to perfect his redemption.

4. There is one other question: That is, even if the amount paid on this redemption was insufficient because of the payment of a less per cent. than was required by the old statute, yet where the party attempted in good faith to make this redemption, he had a right to assume, under the authorities as they existed at the time the redemption was made, that the legislature had the right to change the per cent. and he had a right to assume that one per cent. was all that would be required; and if he paid less, on that assump-

tion, than what might be now held to have been required, that still he would have the right to pay this additional per cent., where he set up in his answer and offered that if it should be held to be required that he would allow the plaintiff to take judgment against him for that amount. That is, that where he had pursued in good faith what appeared to be (and what was) the law of the land at the time he made this redemption that in equity he should not be deprived of his right of redemption where he offers to pay all that may be required under a different construction of the law, and offers to allow judgment to go against him for that amount; that he would be entitled to perfect his redemption upon payment of the amount. 127 Cal. 532, and 119 Cal. 463.

Parnell v. Hall, 45 Cal. 193;

Kofoud v. Gordon, 122 Cal. 314.

And a trivial deficiency in payment will in equity be disregarded, no matter how it may have occurred without the wilful act of the one seeking to redeem.

Hall v. Fisher, 9 Barb. 17.

And where the correct amount is a matter of dispute and grave doubt such as to involve a judicial construction of a statute as applied to the constitution of the United States, before it can be definitely determined what is correct, and the redemptioner paid all that was required by the

sheriff, and all the law required, as it was construed then by the highest court of the world, he is not called upon to do more than offer to pay what additional amount may be so found, and let it go in as a condition of the judgment.

It being so, that the weight of authorities on this subject may be reconciled, by the views we have presented, we can see no reason why the settled rule of property which has controlled for more than twenty-one years by reason of the construction given to the law by this court, should now be disturbed.

Respectfully submitted

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